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NO. 2604

United States
Circuit Court of Appeals
For the Ninth Circuit

RUDOLPH SCHULTZ,

Plaintiff in Error,

vs.

STACK-GIBBS LUMBER COMPANY, a Corporation,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division

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Spokane, Washington,
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BRIEF OF RESPONDENT.

In order that the court may have a clear understanding of the facts in this case we take the liberty of giving a brief history of the case.

This action was originally started in the District Court of the First Judicial District of the State of Idaho, and thereafter removed to the Dis-

trict Court of the United States for the District of Idaho, northern division.

The defendant company moved to strike out a large amount of the matter contained in the plaintiff's two causes of action, and thereafter his honor, Judge Dietrich, sustained the motion as to a large part of the complaint and directed that said matter be stricken out. The defendant thereupon demurred to both causes of action as set forth in plaintiff's complaint. The demurrer was thereafter presented and the Honorable District Judge sustained the same as to both causes of action. The appellant did not see fit to amend his complaint but filed a specific election to stand on the complaint. The election being in the following words:

> "The plaintiff above named by Charles E. Miller, his attorney, a demurrer to his complaint herein having been sustained, now herein elects to stand upon the sufficiency of his said complaint and the count may proceed accordingly.
>
> CHARLES E. MILLER,
> Attorney for Plaintiff,
> Residence and P. O. Address:
> Wallace, Idaho."

Upon said election having been filed and served the honorable District Judge entered a judgment

dismissing the action. This judgment was entered in November, 1914. No further proceedings whatever were taken by the plaintiff or appellant herein until the 31st day of March, 1915, when a citation in error was served upon the respondent.

No bill of exceptions or other record in the case was ever served upon the respondent, other than a bill of exceptions upon the motion to strike out parts of plaintiff's complain; but no bill of exceptions for the final recrd in this case has ever been served upon respondent, and at thist ime respondent does not knew what has been included in the record sent up to this court. No printed record has ever been served upon respondent and at the time of preparing this brief respondent does not know what the record will contain, and, therefore, cannot refer to the printed record by page and folio as required by the rules of this court. Subdivision C, para. 2, Rule 24

STATEMENT AND AUTHORITIES ON THE ORDER OF THE COURT STRIKING OUT PARTS OF THE COMPLAINT.

In the brief which has been served the appellant specifies as error the striking out of certain parts of the complaint by the Hon. Dist. Judge. We do not think that under the conditions of the record this mater can be considered at this time; but if the

court should decide to consider the same we respectfully submit that the ruling of the lower court was correct.

The part alleged in plaintiff's brief to have been stricken out,—which is the only record tha has been served upon the respondent setting forth such facts,—being the matters assigned as the first error, we think are not well taken. It matters not whether plaintiff was a millionaire or owned nothing, he contracted with the defendant to perform certain services and his financial ability was not made a part of the written contract. The contract was full and complete in its terms. It should not now be added to or changed by parol and this plaintiff is attempting to do. If the contract was breached by the defendant wrongfully, the plaintiff has a cause of action, whether he be millionaire or pauper, and the allegations in his complaint as to what his assets were or that the defendant knew them are immaterial.

The matters alleged on page ten of the brief as having been stricken from the complaint are also immaterial. It matters not what plaintiff had done, whether he had spent all of his money or whether he still had a million dollars. This would not give rise to any cause of action nor be any part of a cause of action. This is also true of the second matter set

forth on that page of the brief, because if, as before stated, the contract was breached by defendant wrongfully, a cause of action arose and it made no difference whether plaintiff had exhausted all of his resources or not, because if he had a right of action the right of action accrued to him regardless of what he had left or what he had spent.

The case of Skagit Railway and Lumber Co. vs. Cole, 2 Wash. 57, cited by council is not in point, as it will be noticed by a reading of that case that it specifically states that the party bringing the action had no moneys to carry on the contract with, and that defendant specifically understood and agreed to furnish plaintiff the reasonable market price of all provisions and logging supplies needed by him to carry on the work under the provisions of the contract, and it was because of the refusal to comply with this provision of the contract that plaintiff claimed a right to maintain the action. Here there is no such a contract as this, neither is there any allegation that defendant made any agreement to do any such act, then, therefore, it is no part of the cause of action. In the case cited by counsel it was the breach of this covenant of the contract which gave rise to te cause of action, while here the alleged breach does not consist in any of the things stricken out whatever, and therefore they are en-

tirely immaterial. If the complaint states a cause of action at all it states it without these matters being therein. If it does not state a cause of action without these, their addition does not assist it in so doing. This was the view taken by the learned District Judge and we submit it is correct.

STATEMENT OF FACTS.

In order that the court may understand the facts in this case it is in reality but necessary to read the written contract upon which the causes of action are based. Plaintiff in his complaint has pleaded considerable but the real cause of action is exhibits A and B, and the only matters alleged in plaintiff's complaint which are at all material are those allegations in which he alleges, or attempts to allege, a breach of the contract by the respondent.

In Exhibit A the appellant contracts with the respondent to remove certain timber located on the land belonging to respondent in Shoshone County, Idaho. This contract provides, among other things, the following:

> "That said logs shall be scaled with a Scribner Decimal A Rule by a scaler to be mutually agreed upon by the parties hereto, each to pay one-half of said scaler's wages, the party of the first part to board said scaler at his expense. * * * That the party of the first

part agrees to furnish receipts for all of the labor performed on the above mentioned logs, or satisfactory evidence tha said labor has been fully paid; also receipts for payments of all supplies used in logging the timber, or satisfactory evidence that said supplies have been fully paid."

That part of the contract which provides for the time of payment, and which is the essential point involved in this appeal is as follows:

"In consideration of the stipulations herein to be fully performed by the party of the first part, the party of the second part agree to pay to said party of the first part on the 15th day of each month three and 25-100 dollars per M foot, board measure, for all said white pine and yellow pine logs which shall have been placed on skids by the party of the first part during the proceeding calendar month, *providing, however,* that the party of the first part shall have roads made from said skidways to the banking ground on Pine Creek without additional expense, excepting for hauling and Two and 25-100 Dollars per M. feet, board measure, on the 15th day of each month for all said white pine and yellow pine logs which shall have been hauled and floated in Pine Creek by the party of the first part

during the preceding calendar month and the balance of $1.00 per M. feet board measure on the 15th day of each month, for all said white pine and yellow pine logs delivered in the Main Fork (North) of Coeur d'Alene River during the preceding calendar month."

These are the provisions of the contract upon which the first cause of action is based. The two contracts will be presented separately as they have in reality no connection.

The demurrer filed by the respondent calls special attention to the insufficiency of the complaint and was a special demurrer. Subdivision 3 of paragraph one of the demurrer being to the effect that the complaint did not show that the compensation was due for the reason that the plaintiff had not alleged, stated or shown that he had built the right of way over which to haul the logs to Pine Creek, as provided for in the contract.

As it was upon this particular point that his honor, Judge Dietrich, sustained the demurrer to this cause of action we will present it first.

The other grounds of demurrer were to the effect that the logs were to be scaled by a scaler to be mutually agreed upon, and that until this was done the plaintiff was not entitled to compensation. The plaintiff was to furnish receipts for all supplies

used in logging the land before he was entitled to the money. Paragraph two of the demurrer was upon the ground that plaintiff had failed to allege that he had secured the logging right of way or road to haul the logs over, or that the road had been built so that the logs could be hauled to Pine Creek. Subdivision 2 of paragraph one was as to certain elements of damage claimed; and subdivision "c" of paragraph two was that there were two causes of action improperly united in one complaint.

ARGUMENT AND AUTHORITIES.

Counsel in his brief filed herein has discussed many things which are, in our opinion, immaterial to the issues presented.

Commencing on pages 16 of his brief and continuing down thru all the matter of damages seems to us to be entirely out of place in view of the grounds upon which the demurrer was sustained; and upon this question it seems to us to be out of place to attempt to submit authorities.

Rule 10 of the District Court of Idaho provides, among other things:

> "In actions at law the pleadings shall be in accordance with the laws of the state as the same shall exist at the time in question."

In Idaho there is no such thing as a motion to make a complaint more definite and certain, but

this is reached by special demurrer.

> "Any ambiguity or uncertainty therein could *only* be reached by special demurrer alleging such grounds and pointing out the defect specifically."
>
> *Naylor v. Vermont Loan & Trust Co.*, 6 Ida. 251;
>
> *Yornie v. Blackfoot Land & Water Co.*, 15 Ida. 56.

The demurrer in the case at bar is special and points out the ambiguities and uncertainties complained of in detail.

Taking up the demurrer, first upon the ground sustained by the honorable District Judge, we desire to call particular attention to a part of the honorable District Judge's statement in the memorandum decision sustaining the demurrer. In this his honor said as follows:

> " * * * it is provided that the first payment shall be made to the plaintiff at a certain time, in case that at such time the plaintiff shall have built roads from the skidways to the banking ground on Pine Creek so that the logs can be hauled to Pine Creek without additional expense. Under a fair construction of the contract the building of these roads is a condition precedent to the maturity of the obligation to

make the first payment. It is possible that the plaintiff intended to plead the construction of these roads, but there is no direct allegation to that effect and there is no reasonable inference. It is alleged that he, the plaintiff, spent certain moneys for that purpose, but that fact alone does not imply the completion of the road. I think if it be a fact that the road is completed there should be inserted a positive statement to the effect that this provision of the contract has been complied with. This insertion may be made by interlineation, if the plaintiff so desires."

It will thus be seen that the court held in sustaining the demurrer that if plaintiff had complied with his contract all that it would be necessary for him to do would be to make a short interlineation alleging that fact, but plaintiff refused to make this amendment. The only fair inference from the plaintiff's action is that he could not make such an allegation for the reason that he had not performed this part of the contract. In other words, it is practically an admission that plaintiff *had not built the road from the skidways to the banking ground on Pine Creek so that logs could be hauled to Pine Creek without additional expense.*

In order that the court may understand this part of the contract, it should be viewed in the light of circumstances surrounding logging operations in North Idaho, with which his honor, Judge Dietrich, was familiar, and which knowledge he used in passing upon this question. These logs were to be cut several miles from the river in which they were to be floated out to market. The defendant had no right of way from its lands where the logs were being cut to this river. In letting the contract it was explicitly provided that plaintiff should secure this right of way and build these roads so that logs when cut could be readily brought to market. Without this right of way and road having been obtained and the road built the logs would be valueless when cut, as there would be no way to bring them to market; and in order that they might not be cut and left on the skids to waste the defendant explicitly provided that the money, which was to be due when the logs were put on the skids, should be paid *provided* the road was built so that the logs could be hauled out without additional expense, because if the right of way was obtained and the road built and plaintiff for any reason failed to bring the logs out of woods, then the defendant would have an opportunity to secure the services of others to put the logs in and thereby save its property from loss, but if the right

of way was not obtained and the road built the defendant would then be at the mercy of every one over whose land the right of way would have to be secured in order to take its logs to market.

It was unquestionably the intention of the parties that the right of way should be obtained and the road built before any money whatever became due to the plaintiff and therefore as held by his honor Judge Deitrich, the maturity of the obligation depended upon the securing of the right of way and building the road. And as plaintiff had not alleged these facts, under a special demurrer, the complaint did not state sufficient facts to show the maturity of the obligation sued on, and in view of the fact that the court authorized an amendment by interlineation, it is only fair to assume that this road was never built, and therefore that the right to this money never matured, because had it been otherwise the plaintiff would have amended by a short interlineation and saved the expense of this appeal.

is to become due provided a certain act has been performed, that it is then incumbent upon the party claiming the money to be due under the contract to allege specifically that the thing which matures the obligation, that is, the act which the contract speci-

Briefly stated, our position is that where money

fied should be done to entitle the party to payment. had been performed.

The money was to be paid at a certain time *provided* roads had been made so that the logs could be hauled without any additonal expense, excepting for the hauling charge alone. It is our contention that the very explicit conditions of this contract setting the maturity of this obligation on the 15th of each month was conditional upon the roads having been built. In other words, the money was not due on the 15th of the month unless the roads were built. We take it that the word "provided" makes a condition the performance of which must be alleged before the complaint shows a maturity of the obligation of the right to claim the benefit of the condition

> "We think the term "provided", as here used, must be construed as a condition, for such is clearly the intention of the parties. "Provided" is defined by Webster as: "On condition; by stipulation." Mr. Bouvier, in his Law Dictionary, says: "A proviso always implies a condition, unless subsequent words change it to a covenant." Mr. Anderson, in his Dictionary of Law, says of "provide": "No word better expresses a condition, and it is always so taken, unless the context shows that the intent was to create a covenant."

Ormsby v. Phenix Ins. Co., 58 N. W. 301-303;

DeWitt vs. Kaufman County, 66 S. W. 224.

The Circuit Court of the Fourth District in passing upon this question said as follows:

> "When one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants are dependent, and the other is not bound to perform until the first act has been done, because the first act is a condition precedent to performance of the other; and, in all cases where covenants are dependent, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and, in determining whether covenants are dependent or independent, the intention of the parties and the good sense of the case will be regarded rather than the technical sense of the word used."

Huggins v. Daley, 77 Fed. 606, p. 610.

We think this case aptly applies here, because the thing to be done by the appellant in this case before he was entitled to payment was, not only to skid the logs, but to have roads made from the skidways

to the banking grounds so that the logs could be hauled without additional expense; and his right to compensation was dependent upon having this work and labor performed, his act was a condition precedent to being entitled to any money whatever, and was to be performed in the order of time specified in the contract namely, he was to have the work done before being entitled to any money whatever. And we respectfully submit that by reason thereof, and the failure of complainant to allege anything which even intimates that he has performed this condition, there is nothing to show the money ever became due.

The other grounds of the demurrer are simply that Exhibit A, which is attached to the complaint and made a part of it, shows that certain measurements were to be made by a third party as a condition precedent to the right of recovery. For instance the contract explicitly provides: "that the logs shall be scaled with a Scribner dec'l A Rule by a scaler to be mutually agreed upon by the parties hereto." In other words, here it is agreed that a certain person, or persons, to be elected by the parties, shall measure the logs or set the amount for which compensation is to be paid, and it is a condition precedent to the party's right of recovery that such party shall have made the estimate. And before the party is entitled to compensation for do-

ing the work the scaler must have been agreed upon between the parties, or else the party seeking the compensation must make some allegation as to why this was not done, or show that through no fault of his this neglect occurred, because surely the Stack-Gibbs Lumber Company cannot be held or required to pay for logs until they are scaled in the manner provided by the contract; and this being a condition precedent to the plaintiff's right to compensation, he states no cause of action until he alleges and shows that these logs were scaled as provided in the contract, or shows some reason why the same was not done.

> "So if the contract is to be performed to the satisfaction of a third person, as where the certificate of an engineer or architect is required or the price to be paid is dependent upon his decision as to the quantity, quality, or price of materials, or the quality of workmanship, it must be alleged that the person designated has performed the stipulated condition, *since until this is done or its performance excused the plaintiff has no right of action.* And if the plaintiff fails to allege performance of the condition in declaring on the contract he must be nonsuited on the ground of variance, the contract alleged being absolute, while that proved is conditional.

So if the contract is truly stated, but the averment of a performance of the condition is omitted, the pleading will be held bad on demurrer or in arrest of judgment as showing no cause of action, or the plaintiff will be nonsuited because his evidence shows no right of action. And a certificate given after the commencement of the action comes too late to save the plaintiff's case."

9 *Cyc.* 700 para. b.

"If the plaintiff's right of action depends upon a condition precedent, he must allege and prove the fulfillment of the condition or a legal excuse for its nonfulfillment. And of he omits such allegation, his declaration, complaint or petition will be bad on demurrer."

9 *Cyc.* 699.

The plaintiff states that he has alleged that "the logs in payment for which the defendant had defaulted had been scaled as required by the contract." If we take him at his word he is stating no cause of action, but has only stated a conclusion of law. His allegation that "the logs have been scaled as required by said contract", is not a statement of any fact but a statement as to a conclusion of law and presents no issuable fact in this case. Suppose defendant should deny that the logs have been scaled as re-

quired by the contract, the court then would have no issuable fact before it. It would simply have a legal conclusion as to the requirements of the contract and would have no statement of facts as to what had actually been done.

Counsel has not cited a single authority in opposition to those cited by the defendant to the effect that where work is to be measured by a third person, and the money is to be paid by the rate of compensation fixed by a third person, that it must be shown that such adjustment has been made, or the measure of compensation ascertained by such third person before a cause of action arises, and without this being alleged the complaint is certainly defective.

> "That an obligation to pay money may be dependent upon the action of a third person, over whom neither party has any control and that payment cannot be exacted unless the specified act is performed is familiar law."
>
> 9 *Cyc* 700.

> "It was alleged that he work had been completed and the contract fully performed on their part, but there was no allegation in regard to the estimate by the engineer. The defendant demurrer for insufficiency and the demurrer was overruled. Held that these two counts were

bad because of the omission in respect to an estimate as provided by the contract."

Loup et al v. California So. Ry. Co., 63 Cal. 97. In the opinion the court says:

"In Smith v. Briggs, 3 Denio, 73, defendant had covenanted to pay the plaintiff for doing the carpenter work of certain houses, when he should receive from the architect his certificate that the work was fully and completely finished according to the specifications annexed to the contract, and it was held that the giving of the certificate by the architect was a condition precedent, the performance of which must be averred in the declaration in an action to recover payment of the work. *Morgan v. Birnie,* 9 Bing. 672, is the same effect; and this court in *Holmes v. Richet,* 56 Cal. 307; affirmed the same doctrine. "If," says Mr. Justice Bramwell, in *Elliot v. Royal Ex. Assurance Co.,* L. R. 2, Ex. 245, "the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third party has so assessed the sum, for to say the contrary would be to give the party a different measure if rate of compensa-

tion from that for which he bargained." "And," says the Supreme Court of Vermont, in *Herrick vs. Belknap,* 27 Vt. 673, "If payment for the work performed is dependent upon, and to be made according to the engineer's estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, etc., the obligation to pay will not arise until such estimates are made, unless no estimates have been made through the neglect or fault of the engineer or of the party who employs him."

"These cases establish the proposition that the action in hand was according to the allegations of the complaint, prematurely brought, and the demurrer to the complaint ought to have been sustained."

Loup et al v. California So. Ry Co. supra.

It is exactly the same here. There is no allegation regarding the scaling of these logs and until that was done the amount of compensation to be paid the plaintiff was never ascertained, and it was to be ascertained in the way provided by the contract, namely, the estimates of the scaler agreed upon, and until plaintiff alleges that that has been done he has not alleged a cause of action.

The same question was also involved in the case

of McNamara et al v. Harrison et al, 46 N. W. 973, in the Supreme Court of Iowa and citing the case above referred to and other cases the court said:

> "Until it is shown that the chief engineer has made the required certificate or there is some good reason shown why it has not been furnished, no action can be maintained."
>
> "Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party who seeks enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect."
>
> *United States v. Roboson,* 9 Peters, 319, 9 Law Ed. 142.

A large number of authorities are collected in Holmes vs. Richet, 56 Cal. 307, beginning on page 312 of the opinion the court, among other things, says as follows:

> "In other words, was it not a condition precedent to any right of action, that he value of the extra work should be determined in the mode provided by the contract?"

The court, after having asked the question, then determines it in the affirmative. We think no authorities can be found holding other than this and

until a proper case is made out by the plaintiff so that the parties upon the trial will know exactly what o meet and what witnesses to prepare for at the trial, it is impossible for them to properly present their defense.

We think there can be no question but what it was the intention of the parties in this contract that before either the plaintiff was entitled to any money or the defendant was to be compelled to pay therefor, that the logs were to be scaled by some scaler mutually agreed upon between them, and the complaint is silent as to the alleging tha any such scaler was agreed upon or anything which would excuse the omission of scaling of these logs by such scaler on the part of the plaintiff; and until such allegation is made, or some showing made as to why this condition was not performed, the plaintiff was not entiled to any compensation under the contract.

The second ground of the first paragraph of the demurrer is as follows:

> "That it appears from said contract, "Exhibit A", attached to and made a part of said first cause of action, that said plaintiff was to furnish receipts for all labor performed on the above logs or satisfactory evidence that all labor had been fully paid, and also receipts for payment of all supplies used in the logging of

said timber, or satisfactory evidence that the same had been fully paid for, and it appears from said contract that the same had been fully paid for, and it appears from said contract that the furnishing of such receipts or satisfactory evidence was a condition precedent to the right of compensation by said plaintiff, and said complaint does not allege, state or show that such labor or supplies were paid for by the plaintiff prior to said time or that such receipts or evidence was furnished to the defendant."

The contract itself provides as follows:

"That the party of the first part shall furnish receipts for all labor performed on the above logs or satisfactory evidence that said labor has been fully paid, also receipts for payment of all supplies used in logging off the above mentioned timber or satisfactory evidence that said supplies should be fully paid; that said party of the first part shall fully perform their part of this contract and cut into said logs, skid, haul, float and drive all said white pine and yellow pine timber and deliver same in the main north fork of the Coeur d'Alene River on or before June 1, 1914, except should the work of getting the white and yellow pine logs out by the party of the first part be delayed from cause;

unavoidable that the time be extended by mutual consent of the parties hereto."

It is clear from a reading of the contract that it was the intention of the parties that at the time plaintiff should demand payment for any money due him for logs that he should furnish defendant with receipts for the payment of labor and supplies. The court in construing this contract will, of course, construe it in the light of the situation of the parties and the reason for this provision being placed in the contract. The reason for placing this provision in the contract was undoubtedly to protect the defendant in making payment so that whenever plaintiff should be entitled to any money defendant would have evidence that no liability was outstanding for which its logs would be taken by mechanics' or laborers' liens. This also applies to the supplies, as at the time this contract was made the supply lien law of the state of Idaho was still in force and effect and the decisions of the Supreme Court of this state nullifying that law, as was done in the cases of Anderson against Great Northern Railway Company, 25 Ida., 433, and Donovan, etc., vs. Tri State Cedar Company, 25 Ida. 462, had not yet been rendered. It is plain upon the face of this contract that the defendant lumber company desired this evidence of payment at the time it made the various remittances

so that plaintiff could not receive the full amount due him for work under the contract and at the same time allow his labor and supply bills to go unpaid, which would become a lien upon the saw logs and defendant's property taken from him and it be compelled to make double payment therefor. And while the contract may not be exactly definite as to when this evidence was to be furnished viewed from the situation of the parties and the light of the contract and conditions generally surrounding logging operations, it shows clearly that it was intended that these receipts be furnished for the work and labor performed up to the time the payments became due in order that the lumber company might protect itself against laborers and supply liens, as otherwise, it would have to pay the contractor the full amount due him under the contract at the same time the logs would be responsible for all labor performed and all supplies furnished to that date, which would be no safeguard to it at all. The authorities before cited on the question of pleading a condition precedent we think equally apply to his, and that before plaintiff is entitled to a cause of action against the defendant he should be required to show that he has done and performed those things which entitle him to compensation under the contract.

Paragraph two of the demurrer is to the effect

that the complaint is ambiguous, unintelligible and uncertain. Subdivision "a" of paragraph two is as follows:

> "That it alleges in paragraph six that said contract provided and required plaintiff to furnish all right of way over which to haul logs to be cut from the land at his own expense and also alleges that plaintiff had expended for right of way the sum of $200.00 and more than $1100.00 for building and constructing such road and to fit the same for the purpose of hauling the logs to water, but does not allege, state or show that plaintiff had secured or had any legal contract for the right of way or use of the road or an easement for hauling logs across the land from the place of the skidding of said logs to the place where they were to be delivered in Pine Creek, or that such road had been built its entire distance sufficient or proper over which to haul said logs."

We think that when the parties entered into a contract providing explicitly that the party of the first part should secure a right of way over which to haul the logs, as is provided in the contract attached to the complaint in this case, that this meant that he should secure a legal right to do this,—one

which he could enforce,—one that would protect the defendant so that in paying to the plaintiff money for the logs which had been cut and skidded the defendant would know that plaintiff would have an absolute right to haul those logs over the road in getting them out and delivering the same to it in the creek. It certainly cannot be contended that plaintiff could go to every individual who owned land between the place where the logging operations were and Pine Creek and ask permission to cross his land, and without securing anything more than a verbal permission, revocable at will, compel defendant to make payment of the full amount of money due under the contract. This would not be in accordance with the intention of the parties, and to construe the contract in this way would do violence to its intention, as it is plain upon the face of the contract that defendant was to be protected in the payment which it was to make by knowing that this right of way had been secured, and legally secured, so that when it paid for the logs being cut and placed upon the skids it knew plaintiff would have the legal right of way to haul them from the skids to the banking grounds; and, as the complaint does not state or show that they ever secured any legal contract therefor, the court will not presume that any legal contract has been secured for the right of way, but will require

plaintiff to plead and show such fact. Neither does the complaint allege, state or show that this road had been built its entire distance, and under the explicit wording of the contract it was necessary that this be done before any payments should be made by defendant. And the defendant in this case is at a loss to know whether the plaintiff is claiming that he did have a legal contract for the right of way; whether he is going to try to claim that he built the road its entire distance, or what his claim will be upon the trial of the case; and we think we should, and do, have a right to require plaintiff to allege this so that we will know upon the trial of the case what evidence to produce in order to meet plaintiff's contention. If this is not explicitly alleged it would require us to have a large number of witnesses present in order to meet the contentions that plaintiff may not urge and set forth when the case is tried, and would incur a large amount of expense to both parties needlessly, simply because of the ambiguity and uncertainty of the complaint.

Subdivision "b" of paragraph two goes rather to the pleading of special damages. The plaintiff is seeking in this case to recover for all profit which he claims he would have made had he been allowed to fulfill this contract. He is also asking to recover all of the expenses which he has paid out. If he is

entitled to recover at all, only the loss which was actually occasioned because of the breach of the contract would be all that he would be entitled to. In other words, if the building of the roads and cutting of the timber cost him $3.00 per thousand, and he was to receive $3.25 per thousand for cutting and skidding, then his measure of damages would be but twenty-five cents per thousand, and certainly he cannot collect that twenty-five cents per thousand and at the same time the money which he has expended for building roads, labor employed and expense incurred in making that profit. To do so would be to entitle him to recover more than he could have secured had he performed the contract and would be requiring defendant to pay him his prospective profits as well as his expenses, which he is certainly not entitled to.

Subdivision "c" of paragraph two of the complaint is the objection that two causes of action are improperly commingled and united in one count, the demurrer being as follows:

> "That in said first cause of action two causes of action are improperly commingled and united in one, to-wit: A cause of action for damages for alleged profits claimed to be recoverable because of breach of contract, and also an alleged cause of action for moneys ex-

pended as such damages in buying and building roads which cannot be recovered in the same cause of action with the alleged profit, for the reason that it creates in the same cause of action a different element of liability for damages to which the plaintiff is not entitled."

It seems to us clear that the two elements of damage stated in the first cause of action cannot be commingled, because if plaintiff is entitled to recover his profit, then he would be made whole because of any damage sustained. But if at the same time he should also be entitled to recover special damages, such as expenses laid out in attempting to perform the contract and for such work as building roads, he would be recovering damages and imposing a double liability upon the defendant for a breach of the contract, which is unquestionably not permitted by any form of pleading nor any form of action, as only the actual damages suffered by the party is all that he can recover; and the building of the road would not be a special element of damage any more than the loss of time, which would be wholly consumed in the performance of the contract. Upon this we think any argument or citation of authorities would be out of place.

There are, we admit, also two causes of action improperly united in the claim the plaintiff cut and

skidded logs for which, at the contract price, he was entitled to be paid the sum of $821.59 on the 15th of the month, which sum he was not paid; and in the further claim that the defendant repudiated the contract and prevented the plaintiff from fully performing the same by reason of which plaintiff lost the profits he would have made if he had not been prevented by the defendant from getting ahead, and also the sums of money which he had expended These two claims, however, growing out of the same contract, are distinct and separate, and either could be sued upon alone and clearly constitute two separate causes of action. The foundation for the claim for profits is that the defendant repudiated the *whole* contract and *prevented* plaintiff from further performing, while the other cause of action is for work and service actually rendered by the plaintiff at the contract price. These two causes of action should have been separately stated.

But there lies in the claim and cause of action for profits, because the plaintiff was prevented from fully performing the contract, a more serious and vital defect than mere improper joinder. The claim for profits and for the moneys expended shown in paragraph VIII of plaintiff's complaint, does not contain facts sufficient to constitute a cause of action, however clearly intended to be such. If the

allegations that the plaintiff was "prevented" by the defendant and that the defendant "repudiated" the contract, stood alone in the pleading as against a demurrer, they might be sufficient though they are obviously mere conclusions, but they do not stand alone, the plaintiff explaining that the "prevention" and "repudiation" relied upon consist in the failure of the defendant o make the payment for the logs which the plaintiff had actually cut and skidded, and which was due on the 15th of the month The contract is a divisible contract, the work done in each mont standing by itself and to be paid for on a fixed date at a fixed rate by itself. The written contract on which the action is founded does not provide that the payment of each installment by the defendant is a condition precedent to he plaintiff being required to further perform his contract. The failure to make such payment is the only act charged against the defendant as "prevention" or "repudiation." It is only when the plaintiff is actually prevented from performing the balance of the contract that he is entitled to consider its as terminated and to sue for what he would have made upon it if he had been permitted to carry out his part of it. Under these conditions, on the face of the complaint and on the face of the written contract, the cause of action for damages and the amounts expended by

reason of "prevention" by the defendant cannot be sustained.

Palmer & Robertson v. O. M. R. R. Co., 18 Ill. 217;

County of Christian v. Oberholt, 18 Ill. 223;

Kinney v. Sherman, 2E Ill. 520

The reasoning is so complete and convincing in the opinion of Palmer & Robertson v. O. M. R. R. Co., supra, that it is unnecessary for us to elaborately argue the point in this brief. In this case the court said:

> "I have examined all the authorities referred to by counsel and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglected to do some act without which the plaintiff could not, in the nature of things, go on with his contract; as where he refused to furnish a place wherein to erect a building or to furnish material which by the contract, was to be put in the works and which was to be provided, was to be put in the works and which was to be provided by him. * * * But no where

have I found a case where the failure to pay the consideration for the work as it progresses, according to the terms of the agreement, has been held such an act of omission on the part of the defendant as to prevent the other party from completing the contract. It is undoubtedly true that the failure to make such payments may in point of fact leave the other party without the means of credit to go on and complete the job, but such is not the necessary result of such a failure, and we cannot safely adopt it as a conclusion of law that it does prevent the party from going on. * * * The contract undoubtedly may be so drawn as to make the payment of a part of the consideration by installments as the work progresses, or at stated times independently of the progress of the work, a condition precedent to the further prosecution of the work and make its non-payment such a substantial violation of the contract as to authorize the other party to abandon the work and sue upon it, as for having been prevented from completing it by the act of the party who had thus failed to perform such condition precedent. But the law cannot infer such a consequence from the ordinary obligation to pay money at a particular time or upon the comple-

> tion of a specified part of the work. In order to give a contract such an effect it should contain some provision showing that it was the intention of the parties that the nonpayment of the money as stipulated should produce such a result upon their rights. * * * But such intention must be found in the expressions used in the contract, and is not to be guessed at as being probable from the extent or magnitude of the contract, when there are no expressions in the contract, when there are no expressions in the contract evincing such intention, which would be required to authorize such construction were the subject matter of the contract less important or the amount of the payments withheld more insignificant."
>
> *Palmer & Robertson v. O. M. R. R. Co., supra*

We respectfully and earnestly submit that the honorable District Judge did not err in sustaining the demurrer to the complaint but that his ruling was correct and that as shown by the procedure in this case, the plaintiff tacitly admitted his inability to plead those facts which are essential to make a cause of action; that the Honorable District Judge was correct in dismissing this action, especially in view of the fact that the plaintiff filed and served written notice of is refusal to plead any further,

seeking rather to appeal and try and establish his right of action in this court rather than to amend and set forth these essentials, showing thereby that his cause of action was based upon a technical rather than upon a meritorious cause; and as the demurrer in this case was a special demurrer on the grounds of the uncertainty of the complaint, and,—we think the grounds of uncertainty cannot be denied,—the demurrer was unquestionably good, and we respectfully pray an affirmance of the judgment as to the first cause of action.

DEMURRER TO SECOND CAUSE OF ACTION.

The second cause of action is likewise based upon a written contract, which is a contract for the direct sale of property.

Counsel in his brief on page 27 has stated that the two contracts set up in the two causes of action were interdependent, and that the consideration for the making of the contract "B" was the making of contract "A".

Of course it is an elementary rule that it is the promise and not the fulfillment thereof that is the consideration of a contract, and as the party had already contracted and promised to do certain work that was sufficient to make the other contract abso-

lutely binding, and plaintiff can yet complete exhibit B.

> "In contracts containing executory considerations or mutual promises, that is to say, in which a promise on the one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration, strictly so called; and the obligation of the one promise may be quite independent of the performance of the other."
>
> 9 *Cyc.* 642 b.

Counsel has attempted by making a number of allegations to allege a cause of action and to state that the contract was different from what it explicitly provides in its terms; but we submit that as the written instrument itself is made a part of the complaint and is complete in its terms, that it must be taken as the basis of the cause of action, notwithstanding the fact hat plaintiff has alleged it otherwise.

Counsel on page 28 of his brief calls attention to the fact that the contract provides that plaintiff shall burn the brush in the timber which he cuts, and says that this is conclusive that this contract was dependent upon Exhibit A. This is nothing but a provision in the contract that the appellant will perform the duty imposed upon him by law and was

placed in this instrument for the purpose of relieving the Stack-Gibbs Lumber company from any liability if the appellant failed to perform the duty enjoined upon him by the statutes of the state. Subdivision 39, Section 1605 of the Revised Codes of the State of Idaho as amended in 1909, found in the 10th Session Laws of the State of Idaho, on page 229, provides, among other things, as follows:

> "Sec. 1605. * * * Sec. 3. Any person firm, or corporation engaged in the cutting and removing of timber, logs, ties, telegraph poles, wood or other forest products from lands within the State of Idaho, shall pile and burn or otherwise dispose of the brush, limbs, tops and other waste material incident to such cutting, which are four inches or under in diameter, and the times and methods of so doing shall be prescribed by the warden of the fire district in which said cutting shall be done."

The law then imposes a penalty for failing to do so, and the respondent company was simply contracting that appellant should do this work to relieve itself of any responsibility therefor.

The other provisions called attention to by appellant we submit have no bearing upon the question and is undoubtedly meaningless, as the title to the timber became vested in the appellant upon paying

fifty cents stumpage therefor, and he had a right to remove it therefor, and any warrant of title or quiet possession to him thereof has no bearing upon this case.

His Honor, Judge Dietrich, in passing upon this cause of action in the memorandum decision, said:

> "Coming now to the second cause of action. I do not think that sufficient facts are stated to entitle the plaintiff to recover under this cause of action. The two contracts are inter-related, but it is clear that the defendant has not directly breached the second contract, and if there has been any violation of it at all it is by reason of its necessary connection with the other contract. So far as appears, the plaintiff could have at any time done, and could yet do, the work authorized by the second contract. He has not been interfered with, unless the interference with his performance of the first contract necessarily acts as an interference with his performance of the second. It is possible that the two jobs are so inter-dependent that one cannot be performed without also performing the other, but the court cannot presume that such is the case. If it is from a business standpoint impracticable to lumber the classes of timber referred to in the second contract without also

lumbering the classes referred to in the first contract, that fact should be made to appear. If such is not the fact, it is difficult to see how the plaintiff has in any way been prevented from performing the second agreement."

Under this holding his honor sustained the demurrer to the second cause of action.

The grounds of the demurrer to the second cause of action can be grouped under two principal heads:

1st. There is no allegation of a breach of the second contract;

2nd. This second contract is full and complete within itself, seting forth all of the terms thereof, and the pleading in this case is an attempt to interject into the written contract terms which are not therein, namely, that this contract was dependent upon the completion of the contract Ex. A, which the contract shows is not the fact, and is, therefore, an attempt to vary and change a written contract by parol.

Under the first cause we submit this: That Exhibit B, as set out in the complaint, is a complete contract for the sale by the defendant to the plaintiff of certain white fir, red fir, tamarack, spruce, bull pine and cedar timber upon certain land. The consideration for the sale of this timber was to be fifty cents per thousand feet, board measure, which

was to be paid on the 10th of the month for all timber cut the preceding month. This contract was dated October 15, 1912, and has four years in which to run. If the plaintiff desires to cut this lumber at the present time he can do so upon making payment therefor as provided in this contract. This contract Exhibit B, can be performed by the plaintiff whether the other contract has been breached by either party or not, as there is no provision in this contract providing that it shall become null or void in case either party does not fulfill the contract upon which the first cause of action is based. Until there is a breach of the contract any action brought cannot be maintained, and the plaintiff in his second cause of action sets forth no breach of the contract whatever, and under the explicit terms of the contract itself he has four years in which to remove the timber, which time has not yet elapsed.

Further than that, if the plaintiff was prevented from completing the contract set forth in the first cause of action by reason of the fault or neglect of the defendant this would not excuse the defendant from delivering to the plaintiff the timber mentioned in the contract set forth in the second cause of action. In other words, even if defendant had been guilty of a breach of the contract for logging this land this would not then abrogate the contract set

forth as Exhibit B, but would give plaintiff just as much right to continue to cut that timber as if it had been completed; and until defendant refuses to allow plaintiff to cut this timber, which he has purchased under the terms of contract Exhibit B, he has no right of action against the defendant thereunder. Further than that the terms of this contract are explicit, but notwithsanding this, in order to try to make out a cause of action plaintiff has attempted to inject into his complaint facts to show that he depended upon the money which he was to receive from the first contract to make the payments under the second contract.

There is much included in the second cause of action which is wholly immaterial. For instance in paragraph one of the second cause of action he refers to and adopts paragraph three of the first cause of action, almost the entire part of which is absolutely immaterial in the second cause of action. In paragraph three of the second cause of action he refers to and adopts paragraphs four, five, six, and seven of the first cause of action, and paragraph four has no connection whatever with the second cause of action. Five has no connection with the second cause of action, and that part of six which has not been stricken out is wholly immaterial to the second cause of action. Seven has been stricken out

entirely, leaving nothing in these paragraphs which can or does add to in any manner the cause of action set forth in paragraph two, excepting that plaintiff did not secure from the Stack-Gibbs Lumber Com— pany any money with which he claims to be entitled to under the former contract, and as we contend under the first cause of action that here is nothing owing and that he is entitled to no money thereunder, this has no effect.

It is evident from a reading of the entire complaint that it is the intention of the plaintiff to charge that he had to depend entirely upon the money which he was going to make out of the contract "Ex. A" in order to purchase the timber specified in the contract marked "Exhibit B". However much the plaintiff would desire to inject this into the pleading, there is the very elementary rule that where a contract provides for payments to be made the party cannot add to or change the terms of a written agreement by setting up these payments were to be made out of any particular fund or in a particular manner.

> "A contract of sale is also conclusive as to time, mode and terms of payment and cannot be varied or contradicted as to these things by parol."
>
> 17 *Cyc.* 610.

"We are of the opinion that the answer states no defense. The oral agreement set up in the answer was made at the same time of the notes. It would contradict or vary the terms of the written contract expressed in the notes, change their time of payment, and make them payable out of a special fund. For this purpose it is incompetent and therefore no defense to an action on the notes."

Singer Manufacturing Co. vs. Potts 61 N. W. 23. This was a case in which the defendant attempted to allege that the notes which they had given were to be paid out of a certain fund, but the court held it was no defense whatever.

Ware vs. Cowells, 60 Am. Dec. 482.

"It is no ambiguity in the writing, and there can be no resort to parol evidence to ascertain the meaning of the parties, or the sense in which the words of the agreement were intended, but they must be construed according to the context and the usage of the language. There is nothing either in the context or in the intention of the parties, as shown upon the face of the instrument, indicating that the words were not used in their ordinary sense."

Hunt vs. Gray, 41 N. W. 14, in which the parties attempted to show that payment was to be made dif-

ferent than that expressed in the written agreement, but the court refused to allow same to be done.

Walker vs. Mack, 89 N. W. 338.

> "Where a written agreement for the sale of an interest in an hotel, and the joint operation of the hotel, provides, without ambiguity, for the payment of a certain sum in a certain time for the interest so sold it is not competent to show, by parol that it was understood the payment was to be made out of the profits of the business or in any other manner not specified in the writing."

Smith vs. Kemp, 52 N. W. 639, citing several cases in support of this contention.

This case is very applicable to the case at bar, as here the plaintiff in order to make out an action is attempting to plead and show that he was to make the payments for the timber which he purchased from the defendant out of the profit which he was to make from the logging contract, whereas the contract of purcase is entirely silent upon this point, and it is therefore changing and varying the terms of a written agreement to hold that it was to be paid.

As to the second cause of action we respectfully submit that the contract is one of bargain and sales for certain timber which has four years from the date thereof to run, and no breach of this contract is

shown. And we respectfully submit that the whole cause of action pretended to be set forth in the second count is an attempt by the plaintiff to vary and change the terms of a written contract by attempting to establish that the payments for the timber mentioned in the second contract were to be made out of certain funds wich he was to receive and which he might have as a profit on another contract, and which not only vary and change the terms of the written contract itself, but is a contingency based upon a contingency wholly remote and speculative as to whether or not he ever could have made any profit, and if he had made any profit whether or not he would have invested it in this timber and acquired the title, and is but a remote possibility and not a probability, and is not sufficient to base any element of damage thereon.

We respectfully submit to this honorable court that the honorable District Judge was right in his ruling and that the judgment of the lower court in dismissing this action should be affirmed.

Respectfully submitted,

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